Office - Supreme Court, U. S.
FILED
NOV 27 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

Nos. 598 and 599

HARVARD STATE BANK,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

PETITION FOR WRITS OF CERTIORARI TO THE SPECIAL COURT, DISTRICT OF MARYLAND, AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MEYER ABRAMS,
GERSH I. MOSS,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writs of certiorari	1
Statement of the matter involved	2
Questions presented	3
Reasons for the allowance of the writs	4
Prayer for relief	5
Brief in support of petition	6
The jurisdiction to grant the writs	6
(a) Jurisdiction to review order of the Special Court	6
(b) Jurisdiction to review order of the Fourth Circuit	6
Statement of the case	7
Errors relied on for reversal	9
Argument	10
Summary of the argument	10
I. The jurisdiction of the Statutory Court was limited to the scope of the proceedings under the Railroad Adjustment Act and the subject matter of the construction of the duties and powers of the trustee and the provisions contained in the trust deed was entirely foreign to the plan and to the proceedings	10
(a) The construction of the powers of the mortgage trustee and of the provisions of the trust deed was not embraced in the plan nor in the petition under which the jurisdiction of the Statutory Court was invoked	10
(b) The Statutory Court had neither the actual nor the constructive possession of the collateral, and it was without jurisdiction to pass upon the disposition of the dividends	11
(c) The Statutory Court did not acquire jurisdiction of the subject matter by the intervening petition of the mortgage trustee which could not have originated the jurisdiction	12
(1) An intervenor may not supply jurisdiction of a subject matter which was lacking in the original pleading and jurisdiction may not be enlarged by intervention	12
(2) There was no ambiguity in the terms of the decree and the jurisdiction invoked under color of judicial construction cannot be sustained	13

Page

II. The Statutory Court did not acquire jurisdiction of the parties as the original jurisdiction was limited to the plan and to the consents acquired thereunder 13

III. The petition to vacate the order entered without jurisdiction was timely filed and an order entered without jurisdiction cannot be supported by the defense of estoppel or laches 14

(a) Rule 59b is inapplicable where the jurisdiction of the Federal court is attacked.. 15

(b) Rule 59b is inapplicable to bankruptcy and the decision is in conflict with the decision of the Sixth Circuit 16

IV. The Circuit Court of Appeals had jurisdiction to pass on the issues involved by the appeal taken as of right, and it erred in dismissing the appeal 16

(a) The jurisdiction to review an appeal from a three-judge District Court where the court acts without jurisdiction or where it exceeded its jurisdiction is exclusively in the Circuit Court and not in the Supreme Court, and the motion to dismiss on jurisdictional grounds was erroneously sustained 17

(b) The appeal to the United States Circuit Court of Appeals was properly taken from the three-judge Special Court.... 19

(c) Section 1245 of Chapter XV conferring jurisdiction on the Supreme Court to review the final orders of the three-judge court is confined to orders entered within the limits of its jurisdiction..... 20

(d) Section 1245 of Chapter XV is an additional remedy and is not an exclusive remedy 20

TABLE OF CASES.

Adolph Gobel, Inc., In Re, 80 F. (2d) 849..... 12
Board of Sup'rs v. *Knickerbocker Ice Co.*, 80 F. (2d) 248, 250.... 6
Burke v. *Canfield*, 111 F. (2d) 526, 527..... 6
Cadillac Brewing Co., 102 F. (2d) 369..... 4, 15
Chandler v. *Brandljek*, 296 U. S. 53, 58..... 13
Chicago Title & Trust Co. v. *Robin*, 361 Ill. 261..... 13, 14
Cohn v. *Cities Service Corp.*, 45 F. (2d) 687..... 12
Dannell v. *Wilson-Weesner-Wilkinson Co.*, 109 F. (2d) 364..... 4, 16
Danoff v. *Larson*, 368 Ill. 519 14
Day, In Re, 22 F. Supp. (D. of Md.) 946, 949 16
Hairgrove v. *City of Jacksonville*, 366 Ill. 163 13

Page

Hoefeld v. *Sixty-Third Halsted Realty Co.*, 289 Ill. App. 305 13
Illinois Bell Co. v. *Slattery*, 98 F. (2d) 930 and 102 F. (2d) 58 ..... 4, 19
Mohawk Realty Corp. v. *Wise Shoe Co.*, 111 F. (2d) 287, 289 ..... 4, 15
Oklahoma Gas Co. v. *Packing Co.*, 292 U. S. 386 12
Pianta v. *Reich Co.*, 77 F. (2d) 888 ..... 17, 20
Prudence-Bonds Corp., In Re, 77 F. (2d) 328 12
Wayne United Gas Co. v. *Owens Illinois Glass Co.*, 300 U. S. 131 ..... 4, 16
Whitney, In Re, 113 F. (2d) 426 12
Wilenz v. *Sovereign Camp*, 306 U. S. 573 ..... 4, 18

STATUTES CITED.

Section 240(a) of the Judicial Code 6
Section 745 of Chapter XV of the Chandler Act 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

Nos. 598 and 599

HARVARD STATE BANK,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

PETITION FOR WRITS OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

ON PETITION FOR WRITS OF CERTIORARI TO THE SPECIAL COURT, DISTRICT OF MARYLAND, AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Harvard State Bank, prays the issuance of Writs of Certiorari to review the order of the Special Court, District of Maryland, entered September 28, 1940, and the order of the United States Circuit Court of Appeals for the Fourth Circuit entered November 12, 1940.

Statement of the Matter Involved.

On November 8, 1939, the respondent, The Baltimore and Ohio Railroad Company, obtained a decree approving its Plan under the Railroad Adjustment Act. The Plan extended, among the securities, the maturity of a $50,000,000 note issue from August 1, 1939, to August 1, 1944, and changed interest rate from 4½% to 4% (29 F. Supp. 608). The Manhattan Company, as Trustee under the Trust Indenture securing the $50,000,000 note issue, had as collateral, securities of the "Reading Company", the dividends of which were payable to the B. & O. in the event there was no default and as long as the capital of "Reading" was not less than $225,000,000.

On May 16, 1940, after the approval of the Plan, the Mortgage Trustee filed an intervening petition seeking therein the construction of its powers under the trust instrument in view of the default which occurred and also because there was the question whether it was the Trustee's duty to retain the dividends due to the fact that the actual value of the capital of "Reading" might have been less than the book value because of bankruptcy proceedings wherein the Reading Company was involved.* Jurisdiction of the parties was obtained by mail and publication. The Statutory Court raised the jurisdictional question "sua sponte". It decided in favor of its own jurisdiction and decreed that the Trustee should pay over to The Baltimore and Ohio Railroad Company the $1,694,000 dividends collected during the default period and all future dividends. A more detailed statement of the issues involved and of the facts pertaining thereto appears in the opinion published by the Special Court (34 F. Supp. 154). The order directing the payment was entered simultaneously with the publication of the opinion on August 8, 1940 (R. 2-3).

* The book value was carried at $160 per share and the market value was $5.00 per share (34 F. Supp. 154, 161).

Petitioner, Harvard State Bank, an original owner of $5,000 of the said notes, filed a motion supported by a petition on August 31, 1940, asking the court to vacate its order on the ground that it was without jurisdiction of the parties and of the subject matter (R. 3-5). The Special Court entered an order on September 28, 1940, denying the motion (R. 12-13). Petitioner appealed from that order on October 10, 1940, to the United States Circuit Court of Appeals for the Fourth Circuit (R. 13). On November 12, 1940, the court dismissed the appeal on the ground that the exclusive jurisdiction was vested in this Court by Certiorari (R. 24). The opinion is not yet published and appears in the Record (pp. 17-24).

Questions Presented.

1. Whether the three-judge Special Court acquired jurisdiction of the subject matter and of the parties by the intervening petition which was filed after the approval of the Plan and which related to a subject matter to which no consents were obtained as required under the Railroad Adjustment Act.

2. Was petitioner estopped from raising the jurisdictional question due to the fact that it failed to appear at the hearing set by the court on the notice given to it by mail and whether the doctrine of estoppel and laches can be urged in support of lack of jurisdiction.

3. Whether Rule 59b of the Federal Rules requiring motions for new trial to be filed within ten days is applicable to proceedings in bankruptcy and to jurisdictional questions.

4. Is the exclusive jurisdiction to review any order entered by the Special Court under the Railroad Adjustment Act vested in this Court by the discretionary Writ of Certiorari or is the right of appeal as conferred by the Bank-

ruptcy Act available to the petitioner by its appeal taken to the United States Circuit Court of Appeals for the Fourth Circuit.

Reasons for the Allowance of the Writs.

1. The decision of the Special Court that a motion in bankruptcy to vacate an order entered without jurisdiction is not timely filed after the expiration of the ten-day period as provided by Rule 59b is in conflict with the decisions of the Second and Sixth Circuits (*Re Cadillac Brewing Co.*, 102 F. (2d) 369; *Mohawk Realty Corp.* v. *Wise Shoe Co.*, 111 F. (2d) 287, 289; *Dannel* v. *Wilson-Weesner-Wilkinson Co.*, 109 F. (2d) 364).

2. The decision of the Fourth Circuit in the instant case that the creation of a three-judge court operated to deprive an appeal to a Circuit Court of Appeals because it ranked as such a court is in direct conflict with the decision of the Seventh Circuit (*Illinois Bell Co.* v. *Slattery*, 98 F. (2d) 930 and 102 F. (2d) 58).

3. The decision of the Fourth Circuit that an appeal may not be taken from a three-judge court to a Circuit Court of Appeals where the Federal jurisdiction is assailed on the ground that the three-judge court exceeded its jurisdiction is in conflict with the decisions of this Court (*Swift & Co.* v. *United States*, 274 U. S. 386; *Wilenz* v. *Sovereign Camp*, 306 U. S. 573).

4. The decision of the Special Court applying Rule 59b to bankruptcy is a departure from the accepted law as decided by this Court and by the Sixth Circuit (*Dannel* v. *Wilson-Weesner-Wilkinson Co.*, 109 F. (2d) 364; *Wayne United Gas Co.* v. *Owens Illinois Glass Co.*, 300 U. S. 131).

5. The decision of the Fourth Circuit affects appeals from three-judge statutory courts and the question whether

a discretionary review allowed to this court prevents a right of appeal under the Chandler Act involves matters of vital importance on Federal procedure which should be settled by this court.

Prayer for Relief.

Wherefore, the petitioner, Harvard State Bank, prays the allowance of Writs of Certiorari to the three-judge special court appointed under the Railroad Adjustment Act in the District of the United States for the District of Maryland and to the United States Circuit Court of Appeals for the Fourth Circuit, to the end that the cause herein may be reviewed and decided by this Court and that both orders be reversed and with such directions as to this Court may seem meet.

MEYER ABRAMS AND GERSH I. MOSS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

The Jurisdiction to Grant the Writs.

(a) *Jurisdiction to Review the Order of the Special Court.*

The jurisdiction to review the order of the Special Court is invoked under Section 745 of Chapter XV of the Chandler Act (11 U. S. C. A. Section 1245), which authorizes a review by this Court on certiorari within sixty days from the entry of any final order. On September 28, 1940, the Special Court denied petitioner's motion to vacate its order of August 8, 1940 (R. 12). The order was assailed on jurisdictional grounds (R. 3-5). The denial of such a motion constitutes a final order for review purposes (*Board of Sup'rs.* v. *Knickerbocker Ice Co.*, 80 F. (2d) 248, 250; *Mohawk Realty Corp.* v. *Wise Shoe Co.*, 111 F. (2d) 287, 289; *Burke* v. *Canfield*, 111 F. (2d) 526, 527).

(b) *Jurisdiction to Review Order of Fourth Circuit.*

The jurisdiction to review the order of the Fourth Circuit of November 12, 1940, is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 1938, 28 U. S. C. A. Section 47).

Opinions Rendered.

The opinion sustaining the Debtor's Plan was rendered October 9, 1939 (29 F. Supp. 608; certiorari denied, 309 U. S. 654).

The opinion construing the powers and duties of the Trustee under the $50,000,000 note issue was rendered August 3, 1940 (34 F. Supp. 154-161).

The opinion of the Fourth Circuit dismissing the appeal from the denial of petitioner's motion was rendered November 12, 1940, and is not yet reported (R. 17-24).

Statement of the Case.

The Plan of the Debtor to extend its obligations for a period of eight years and to change certain interest rates was approved by the Special Court of the Maryland District on November 8, 1939 (29 F. Supp. 608-630), and certiorari was denied by this Court (309 U. S. 654). Among other securities there was a $50,000,000 4½% note issue which was extended from August 1, 1939, for a five year period at 4% interest rate. Subsequent to the approval of the Plan, on May 16, 1939, the Trustee of the $50,000,000 note issue filed its petition seeking therein a construction of the terms of the Trust Indenture and of its powers and duties thereunder. It alleged, among other things: (1) That the Trustee was possessed of $38,000,000 of the Refunding and General Mortgage Bonds, Series E, $232,000 of Preferred Stock, $232,000 of Second Preferred Stock and $566,000 of Common Stock of the Reading Company, and that under the provisions of Section 2 of Article Five of the Indenture the dividends thereon were to be paid to The Baltimore and Ohio Railroad Company as long as there was no default and as long as the combined capital and surplus of the Reading Company was not less than $225,000,000; (2) that the Trustee collected during the default period while the adjustment proceedings were pending $1,412,000; (3) that under the provisions of the decree entered by the Special Court on the approval of the Plan it was authorized and directed to pay over all dividends to The Baltimore and Ohio Railroad Company under terms as provided in a Supplemental Indenture executed under the Plan, which Supplemental Indenture contains a similar provision with regard to the dividends as was inserted in the original Trust Deed; and (4) that while the book value of the Reading Company showed its capital and surplus to be $233,000,000, yet if its assets

were written off to the actual value the combined capital and surplus might be less than $225,000,000.

The petition also alleged that the Trustee had reason to believe that the noteholders may take the position that The Baltimore and Ohio Railroad Company was not entitled to receive the dividends because the capital and surplus of the Reading Company were less than $225,000,000 and because of the defaults which existed (although cured by the decree of the court) and as against this position it is required to construe the language of the Indenture which referred to a book value as distinct from an actual value. Among the relief prayed therein was for instructions to the Trustee with regard to the disposition of the dividends collected and for further relief as to the court may seem proper and that jurisdiction of the noteholders be acquired by a notice to be given by mail and by publication in a newspaper of general circulation.

The Special Court construed the terms of the Trust Indenture, the powers and duties of the Trustee thereunder, and determined that the book value, as distinct from the actual value, controlled the situation notwithstanding the fact that the stock which was carried on the books at $160 per share had a market value of $5.00 per share (34 F. Supp. 154, 161). The court directed by its order of August 8, 1940, that the dividends be paid over and that the Trustee continue to pay dividends to The Baltimore and Ohio Railroad Company (R. 2-3).

Petitioner, Harvard State Bank, filed its petition within thirty days from the entry of the order asking to vacate the order on the ground that the court lacked jurisdiction of the subject matter and of the parties (R. 3-5). The court held: (1) That the petition was not timely filed, treating the petition as a motion for a new trial under Rule 59b, and (2) that the motion should be denied on the merits (R. 12-13). An appeal was taken within the time allowed by

law to the Fourth Circuit and there the appeal was dismissed on November 12, 1940, on the ground that exclusive jurisdiction was vested in this court by certiorari (R. 24). The application here is for a Writ of Certiorari from the decision of the Special Court which became final by the denial of the motion on September 28, 1940, as well as from the decision of the Fourth Circuit rendered on November 12, 1940.

Errors Intended to be Urged for Reversal.

1. The jurisdiction of the three-judge Statutory Court was limited to the scope of the proceeding under the Railroad Adjustment Act. The subject matter of the construction of the powers and duties of the Trustee under the Trust Indenture was entirely foreign to the Plan, which was approved prior to the filing of the intervening petition, and the court erred in assuming jurisdiction.

2. The Statutory Court did not acquire jurisdiction of the parties by the notice and publication and it was its duty to grant the motion and to dismiss the proceedings for want of jurisdiction, and it erred in disallowing the motion.

3. The Special Court erred in treating the motion to vacate the order for want of jurisdiction as a motion for a new trial, and in applying Rule 59b to proceedings in Bankruptcy. It was also its duty to hold that a party aggrieved by an order entered without jurisdiction is not estopped by laches and may at any time move to expunge the void order.

4. The United States Circuit Court of Appeals erred in dismissing the appeal on the ground that the exclusive right of action was vested in this court by the discretionary Writ of Certiorari, and it was his duty to review the appeal taken as of right under the Chandler Act.

ARGUMENT.

I.

The Jurisdiction of the Statutory Court Was Limited to the Scope of the Proceedings under the Railroad Adjustment Act and the Subject Matter of the Construction of the Duties and Powers of the Trustee and the Provisions Contained in the Trust Deed Was Entirely Foreign to the Plan and to the Proceedings.

This was a statutory proceeding and the jurisdiction was *limited* by Sections 713 and 726 of Chapter XV (11 U. S. C. A. Section 205).

(a) *The construction of the powers of the Mortgage Trustee and of the provisions of the Trust Deed was not embraced in the Plan nor in the Petition under which the jurisdiction of the Statutory Court was invoked.*

The Plan sought to relieve the Debtor from the default to pay the interest at the rate of 4½%, from paying the $50,000,000 note issue on maturity, and to extend its payment for five years. The Debtor's petition did not ask for the construction of the powers and duties of the Trustee nor of the provisions of the Trust Deed. The only relief sought was the change in the interest rate and in the maturity (29 F. Supp. 608). The Railroad Adjustment Act conferred jurisdiction on the court after the Interstate Commerce Commission approved the plan and the acquisition of certain acceptances before the filing of the petition. The construction of the terms of the Trust Deed and the powers and duties of the Trustee and the right thereunder *was never submitted* to the Commission *nor was it ever submitted to the noteholders,* and their assent was not obtained thereto. The Court was therefore without jurisdiction of the subject matter presented by the intervening petition.

The Special Court, in passing on the jurisdictional question (34 F. Supp. 154) stated that its first impression was that it was without jurisdiction of the subject matter and the Trustee should litigate the questions presented by its petition "in a separate and independent proceeding". However, upon "subsequent consideration" it decided that jurisdiction existed because "the question presented is sufficiently incidentally related to" as "to justify its instructions to the Trustee as to its proper duty".

It based its justification on section 1215 which vested the court with jurisdiction to prevent "against any action which might be inconsistent with said plan" and that "it may fairly be said that the failure of the Trustee to pay over the dividends to the B. & O., if it is the duty of the Trustee to do so, may interfere with the effective execution of the plan." The fallacy is apparent. The Plan extended the maturity and changed the rate of interest. It prevented the Trustee from foreclosure or from taking any other action because of the non-payment of interest or principal. The Plan had no bearing on the question whether the Trustee should pay over the dividends to the B. & O. because of the decrease in the capital and surplus of the Reading Company. There was nothing in the Plan pertaining to this question. There was nothing in the petition which invoked the jurisdiction pertaining to this matter and there was nothing in the decree which affirmed the plan relating to this subject matter.

(b) *The Statutory Court had neither the actual nor the constructive possession of the collateral, and it was without jurisdiction to pass upon the disposition of the dividends.*

The collateral was *neither in the actual nor constructive possession of the Debtor.* It was in the possession of the Mortgage Trustee. The jurisdiction of the Statutory Court was not *any greater than the jurisdiction in ordinary bank-*

ruptcy which is without jurisdiction of assets not in its *actual* or *constructive* possession.

In *Re Whitney,* 113 F. (2d) 426, in a decision rendered July 15, 1940, the Court said:

> "The interest of the bankrupt in the trust which the trustee in bankruptcy Lorenz seeks to reach on behalf of the creditors is vested in law in the Fiduciary Trust Company as trustee of an express trust and that company is bound to resist his claims. We so held in the old case of In re Baudouine, 2 Cir., 101 F. 574. The interest of the beneficiary of a trust who becomes a bankrupt *is not treated as an ordinary chose in action and regarded as in the constructive possession of the bankruptcy court, but the trustee who holds the res on behalf of the bankrupt is classed as an adverse claimant.*" (Italics ours.)

The only exception to the rule is under Section 77B where the jurisdiction was *extended* (*In Re Prudence-Bonds Corporation,* 77 F. (2d) 328; *In Re Adolph Gobel, Inc.,* 80 F. (2d) 849). The jurisdiction under Chapter XV was *not extended but limited.* It is apparent, therefore, that the Special Court lacked jurisdiction of the subject matter.

(c) *The Statutory Court did not acquire jurisdiction of the subject matter by the intervening petition of the Mortgage Trustee which could not have originated the jurisdiction.*

Under Chapter XV the Mortgage Trustee could not have originated the jurisdiction and such jurisdiction could not be supplied by its intervening petition (*Cohn* v. *Cities Service Corp.,* 45 F. (2d) 687; *Pianta* v. *Reich Co.,* 77 F. (2d) 888).

(1) *An intervenor may not supply jurisdiction of a subject matter which was lacking in the original pleading and jurisdiction may not be enlarged by intervention.*

The original petition did not confer jurisdiction of the subject matter. An intervenor may not raise any new

issues and is bound by the pleadings, and *he may not enlarge the jurisdiction* (*Hairgrove* v. *City of Jacksonville*, 366 Ill. 163; *Chandler* v. *Brandljek*, 296 U. S. 53, 58). The Special Court *which had no jurisdiction to determine the issue under the Debtor's petition had no jurisdiction or power to hear the matter under the Trustee's intervening petition.*

(2) *There was no ambiguity in the terms of the decree and the jurisdiction invoked under color of judicial construction cannot be sustained.*

Even if the court could have acquired jurisdiction by the intervening petition there was no basis for the contention that it was necessary to construe the terms of the decree. *There was no ambiguity in the decree.* The decree only referred to the payment by the Trustee because of the waiver of the default by the extension under the Plan. *It did not direct anything about such payment under any of the other terms of the Trust Deed.* The claim that it was necessary to construe the terms of the decree was without foundation as there was no ambiguity in any of its provisions (*Chicago Title and Trust Co.* v. *Robin*, 361 Ill. 261; *Hoefeld* v. *Sixty-third Halsted Realty Co.*, 289 Ill. App. 305). The jurisdiction to construe the Trust belongs exclusively to equity courts and is not vested in a statutory court, if there was anything to construe.

II.

The Statutory Court Did Not Acquire Jurisdiction of the Parties as the Original Jurisdiction Was Limited to the Plan and to the Consents Acquired Thereunder.

The only jurisdiction of the parties which the Court acquired was for the hearing on the petition to confirm the Plan. The Court lacked jurisdiction of the parties under

the issues raised by the Trustee's petition. *The service of notice by mail cannot confer such jurisdiction.* The fact that notices were mailed and no one objected does not supply the jurisdiction of the person. *The doctrine of waiver or estoppel cannot be relied on to cure the jurisdictional defect.*

The Railroad Adjustment Act requires consents by the required creditors. Even if the court had obtained personal service on all creditors *it was powerless to enter the order without the production of the necessary consents.* No such consents were produced. None were ever obtained. The noteholders only consented to the extension of the maturity and the change in the interest rate. *They did not consent to the payment of the dividends out of the collateral if the Trustee had no right to pay it over because of the other provisions of the Trust Deed.* The powers and duties of a Trustee are to be strictly construed (*Chicago Title & Trust Co.* v. *Robin,* 361 Ill. 261), and the consents given to the Debtor should also be construed strictly against the Debtor which acquired them as Trustee for the noteholders. The means by which a person is brought into a court and subjected to its jurisdiction goes deeply into the substance of that person's right and courts have no power to legislate how to bring such a person into their jurisdiction no matter how equitable their action may be (*Danoff* v. *Larson,* 368 Ill. 519) and the notice by mail and publication was void.

III.

The Petition to Vacate the Order Entered Without Jurisdiction Was Timely Filed and an Order Entered Without Jurisdiction Cannot be Supported by the Defense of Estoppel or Laches.

The Special Court gave as a reason for the denial of the motion to vacate the ground that it was not filed within

the period of ten days as required for a motion for a new trial under Rule 59b. The Court overlooked that *this was not a petition for a new trial but a petition to expunge a void order.*

(a) *Rule 59b is inapplicable where the jurisdiction of the Federal Court is attacked.*

The statutory provision for the filing of a petition or motion for a new trial within ten days (Rule 59b) applies to a motion for a new trial by a party to the proceedings based upon error in the Record. The instant case, however, *was not in the nature of a proceeding for a new trial but to expunge a void order for want of jurisdiction.* A void order is subject to attack *at any stage* of the proceedings, and *no estoppel or laches will supply such jurisdiction.*

In Re Cadillac Brewing Co., 102 F. (2d) 369, C. C. A. 6, the court said:

> "The petition to set aside the order for want of jurisdiction did not come too late. Questions of Federal jurisdiction are for the consideration of the court at any stage of the proceedings, and courts of bankruptcy are always open and without terms. Wayne United Gas Co. *v.* Owens Illinois Glass Co., 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557).

The refusal of a court to vacate a decree for lack of jurisdiction cannot be predicated because of the lapse of a term and such a refusal is reviewable as of *right* (*Mohawk Realty Corp* v. *Wise Shoe Stores*, 111 F. (2d) 287, 289, C. C. A. 2), and decisions of the court were cited.

If it be true as held by the Fourth Circuit in the instant case (R. 21) that a decision of a three-judge court "is to be ranked" with that of a Circuit Court of Appeals, then the decision in the instant case that a motion to vacate an order for lack of jurisdiction was not "timely" filed is in direct

conflict with that of the Second and Sixth Circuits and the Writ should issue.

(b) *Rule 59b is inapplicable to Bankruptcy and the decision is in conflict with the decision of the Sixth Circuit.*

The decision of the three-judge court that the petition was not "timely" filed because it was not filed within the ten days period as required by Rule 59b is in conflict with the decision of the Sixth Circuit.

The Sixth Circuit held in *Dannel* v. *Wilson-Weesner-Wilkinson Co.*, 109 F. (2d) 364, that the contention that a Bankruptcy Court may not set aside its order "because of the lapse of time" was "wholly without merit" since it is now "universally accepted" that a Bankruptcy Court "is always open without regard to term". The Court cites as authority the decision here in *Wayne United Gas Co.* v. *Owens Illinois Glass Co.*, 300 U. S. 181. See also *In Re Day*, 22 F. Supp. (D. of Md.) 946, 949.

The effect of Rule 59b was not discussed but the cases were decided after the adoption of the rule and a construction of this rule as applied to Bankruptcy is of extreme importance to the bench and bar.

IV.

The Circuit Court of Appeals Had Jurisdiction to Pass on the Issues Involved by the Appeal Taken as of Right, and it Erred in Dismissing the Appeal.

Petitioner contends that notwithstanding the provision in the Railroad Adjustment Act authorizing a *discretionary* review by this Court it had the *right* of appeal under the Bankruptcy Act and that the Circuit Court erred in dismissing the appeal.

(a) *The Jurisdiction to Review an Appeal from a Three-judge District Court Where the Court Acts without Jurisdiction or Where It Exceeded Its Jurisdiction Is Exclusively in the Circuit Court and Not in the Supreme Court, and the Motion to Dismiss on Jurisdictional Grounds Was Erroneously Sustained.*

The appeal involved the jurisdiction of the three-judge court to determine the issue raised by the intervening petition of the mortgage trustee. It was the contention of the petitioner that the three-judge court was limited in its jurisdiction to the approval of the Adjustment-Plan involving the extension of the maturities and the change of the interest rates but not the construction of the terms of the Trust Indenture nor whether the Trustee should pay over the funds because of other defaults.

The objection being to the *power* of the three-judge court to hear the matter as a court under its limited jurisdiction, the only place where the appeal could have been taken *on the merits* was to the Circuit Court and to no other court. This was squarely decided in *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386. There the court said:

> "The three judge procedure is an extraordinary one, imposing a heavy burden on Federal Courts, with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended. * * * When it becomes apparent that the plaintiff has no case for three judges, though they have been properly convened, their action is no longer prescribed and direct appeal here must fail as well as in this case as where the plaintiff does not press his injunction. Smith *v.* Wilson, 273 U. S. 388, 71 L. Ed. 699, 47 S. Ct. 385, supra."

In *Wilenz* v. *Sovereign Camp,* 306 U. S. 573, the court said:

> "The extraordinary procedure before a court of three judges, designed for a specific class of cases sharply defined by the Statute, cannot properly be extended to cases in which there is no substantial basis for relief by injunction restraining the action of the state officers in enforcing or carrying into effect a challenged state statute of general application. * * * As the case was not one for which a court of three judges is prescribed by Section 266 no appeal lies to this court, and it is without jurisdiction to hear the merits of the appeal."

There the court held that the Circuit Court properly exercised the jurisdiction.

The opinion in the instant case, in disposing of this contention, says (R. 23) that these cases are distinguishable on the ground that there it was determined "that there was no occasion for the convening of a three-judge court" while here there is no attack on the convening of the court, and it only involves "some minor matter beyond the jurisdiction". This minor matter involves dividends of $1,694,000 already collected in a period of about one year and dividends to be collected within the next four years, and it is not such a small minor matter. *The jurisdiction was attacked because the court convened as a special court to hear the subject matter of the intervening petition after it had entered its final order approving the Plan and which subject matter was not embraced in the Plan.* An attack of such a jurisdiction comes within the cases decided by this Court that an appeal lies to a Circuit Court of Appeals *on the merits.*

(b) *The Appeal to the United States Circuit Court of Appeals Was Properly Taken from the Three-judge Special Court.*

In *Illinois Bell Telephone Co.* v. *Slattery*, 98 F. (2d) 930, an appeal from a three-judge court was taken to the United States Circuit Court of Appeals for the Seventh Circuit. There, it was urged that the appeal should be dismissed because the exclusive jurisdiction was vested in this Court. In denying the motion to dismiss and in holding that the appeal was properly taken to the Circuit Court of Appeals, the Seventh Circuit discussed the jurisdictional question and arrived at the conclusion *that the appeal from the three-judge court was properly taken* to that court. A further appeal was taken from the final decree in that case (*Illinois Bell Telephone Co.* v. *Slattery*, 102 F. (2d) 58), and it was urged on appeal that the court was without jurisdiction of the appeal. We quote the following from the decision of the court. On page 63 the court says:

> "As to the question of our jurisdiction, it is urged that an appeal from a three-judge statutory court lies only to the Supreme Court of the United States; that the question presented by the appeal involves a construction of the mandate of the Supreme Court, and, therefore, that Court and no other has jurisdiction. Notwithstanding the fact that this jurisdictional question has heretofore had our careful consideration, we have, on account of the importance of the matter, again made a study of the situation presented in this respect and find no reason to change the conclusion heretofore reached. Inasmuch as our reasoning and conclusion is found in Illinois Bell Telephone Company *v.* Slattery, supra, no useful purpose would be served in a further discussion of the question."

An application for a writ of certiorari was denied (307 U. S. p. 648). The opinion in the instant case refers to

these decisions. The opinion is *contrary to these decisions, so that there is a direct conflict between the two Circuits.*

(c) *Section 1245 of Chapter XV Conferring Jurisdiction on the Supreme Court to Review the Final Orders of the Three-judge Court Is Confined to Orders Entered within the Limits of Its Jurisdiction.*

The provision of Section 1245 of Chapter XV conferring the power on the Supreme Court to review final orders of the three-judge court is not any different than the provision in Section 266 which confers the exclusive power of the Supreme Court to hear appeals in such matters. The same reasoning which is applicable to reviews under Section 266 where the attack is on the jurisdiction of the court to hear the matter is applicable to Section 1245 of Chapter XV. That section deals only with reviews from orders entered by the three-judge court *within its jurisdiction* but does not deal with orders where it had no right to act as a court (*Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386).

(d) *Section 1245 of Chapter XV Is an Additional Remedy and Is Not an Exclusive Remedy.*

Section 1245 merely confers jurisdiction on the Supreme Court of the United States to review all final orders under Chapter XV. This is but an additional remedy to the right of appeal under 24 and 25 of the Bankruptcy Act. The application to review by certiorari *is not an absolute right* as the court may in its discretion refuse to review the proceedings while an appeal under 24 and 25 is a vested right.

In 3 *Corpus Juris*, page 340, the author says:

> "A party may sometimes appeal or sue out a writ of error to reverse a judgment, order or decree, although he may also obtain a review of certiorari."

In the absence of a provision in the Statute excluding the right to appeal, the Statute being *remedial*, should be *liberally* construed. While the framers of the Act might have intended to deprive the parties of their *right* to appeal there is nothing in the Act to express such intent.

For the foregoing reasons we urge the issuance of the writs.

Respectfully submitted,

MEYER ABRAMS and
GERSH I. MOSS,
Attorneys for Petitioner.

Office - Supreme Court, U. S.
JAN 3 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

Nos. 598 and 599

HARVARD STATE BANK,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.
Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE SPECIAL COURT, DISTRICT OF MARYLAND, AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S REPLY BRIEF

and

MOTION SUGGESTING A DIMINUTION OF RECORD

MEYER ABRAMS,
GERSH I. MOSS,
Counsel for Petitioner.

State Law Printing Company, 173 W. Madison St., Chicago—FRAnklin 5501

INDEX.

PAGE

REPLY TO STATEMENT OF FACTS 1

REPLY TO ARGUMENT 3

SUMMARY OF ARGUMENT:

1. The petition raises questions of public or general interest 3-5
2. The decisions sought to be reviewed are in conflict with decisions of other circuits and with the decisions of the court 5-6
3. The decision of the Special Court that it had jurisdiction to determine the disposition of the dividends cannot be sustained under any theory 6-9
4. Petitioner has certified the record as made up by the respondents, and the record is sufficient to present the jurisdictional question 9-10
5. The decision of the Fourth Circuit that this court was vested with the exclusive jurisdiction under Chapter XV affects federal appellate procedure generally 10

MOTION SUGGESTING DIMINUTION OF RECORD 11

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

Nos. 598 and 599

HARVARD STATE BANK,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.
Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE SPECIAL COURT, DISTRICT OF MARYLAND, AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S REPLY

The Complete Restatement Is Inaccurate and Misleading.

Respondents say (p. 2) that a "complete restatement" was "necessary" because there "are so many inaccuracies" in petitioner's statement. On page 3 they point to an alleged inaccuracy and say:

> "The statement on page 11 of Petitioner's Brief that: 'There was nothing in the Plan pertaining to this question,' *i.e.*, the question involving the merits of the issue being presented to this Court, is inaccurate."

The quotation: "there was nothing in the Plan relating to this question" *did not refer to the extension* under the Plan *or to the change* in the interest payments under the Plan which were the *"defaults"* cured by the Plan but *it referred to the question* "whether the Trustee should pay over the dividends to the B. & O. because of the decrease in the capital and surplus of the Reading Company." That such a question was not presented by the Plan can best be shown by the Plan to which *they* refer (p. 3) as Exhibit 7 (Case Number 625 in this court). Counsel were unable *to point out anything in that Plan dealing with the subject matter of distribution of dividends in the event of a "decrease in the value of the collateral."** On page 5 respondents refer to another alleged inaccuracy. They quote from Section 7.07 of the decree and say:

> "The statement at page 11 of Petitioner's Brief that 'there was nothing in the decree which affirmed the plan relating to this subject matter is inaccurate."

The quotation from the brief is from an *incomplete sentence.* The brief (p. 11) stated:

> "The Plan extended the maturity and changed the rate of interest. It prevented the Trustee from foreclosure or from taking any other action because of the non-payment of interest or principal. *The Plan had no bearing on the question whether the Trustee should pay over the dividends* to the B. & O. *because of the decrease in the capital and surplus of the Reading Company.* **There was nothing in the Plan pertaining to this question.** There was nothing in the petition which invoked the jurisdiction pertaining to this matter and there was nothing in the decree which affirmed the plan relating to this subject matter."

---

* The only part in the Plan dealing with the securities is contained in Article III(a)2. It states "The collateral securing the notes will remain unchanged, except that the provision of the Refunding and General Mortgage Bonds constitutes part of such collateral will be modified as set out under 6, below."

A mere reading of the quoted part of the decree as it appears on page 5 of their brief will convince this court that petitioner's statement *is correct* and that *their statement is incorrect.*

Respondents refer (pp. 3, 4) to the record in Case No. 625 on the former application for certiorari. We have no objection to such reference. It is our contention, however, that *none of these matters are necessary in the instant application for the reason that the matter comes up upon a purely jurisdictional question* and that the record in this petition is ample to present such question particularly in view of the published opinion (34 Fed. Supp. 154).

Due to the fact that counsel have raised the point that the court acquired jurisdiction of the subject matter by its decree and supplied one section of the decree which refers to a supplemental trust deed, it becomes necessary for us to suggest a diminution of the record in connection with our reply brief. We are annexing hereto a motion suggesting a diminution of the record and we refer to such record in this reply.

The "Argument" Is Not Responsive and Is Evasive.

Instead of responding to the petition in the given order respondents have chosen the path of confusion and evasion, and it will be necessary to disentangle the confused argument.

1. The petition raises questions of public or general interest.

Evading Point I in our brief (pp. 10-13) discussing the jurisdiction of the three-judge court to adjudicate the subject matter, respondents urge under Point I (pp. 10-11) that the petition raises "no question of public or general interest." If it be true that the three-

judge court assumed jurisdiction of a subject matter of which it lacked jurisdiction and adjudicated the rights of holders of $50,000,000 in notes then it follows that the question is either of public or of general interest to warrant a review. They state (p. 10) that "the sole question" involved here is the "construction" of a "particular" instrument, and "certainly this court will not concern itself with questions of this type, involving only a construction of a particular instrument." *Such a question is not found under the heading* "Questions Presented" in petitioner's brief (pp. 3-4) nor does such a question appear under the same heading *in respondents' brief* (p. 9). *The question presented here is not the construction of a particular instrument* but the *power* of a court of bankruptcy under its *limited* jurisdiction under Chapter XV to assume jurisdiction (after it approved the relief under that chapter) *to construe terms and provisions of trust instruments which are wholly foreign to the Plan.* It is evident that the "particular" construction of the trust instrument *is not the question* presented but the jurisdiction *to construe any part of* any Trust Indenture. Such a question is of "general application" involving jurisdiction and *not confined to particular constructions.*

The fact that Chapter XV "is no longer an effective Statute" does not warrant an adjudication (by a Special Court created under such Act), without jurisdiction, depriving the aggrieved parties of $1,600,000 in collected dividends and of future dividends to be collected during the next four years. The rights of the petitioner and of the other noteholders of the $50,000,000 note issue are affected by the *void* order and *the fact that the Act expired does not supply validity to the void order.* Parties *may not create an Act or a Court* and obtain relief *without regard to due process of law* and after having accomplished their illegal acts contend that a review

should not be allowed because the act was accomplished. If we are right in our contention that the court had no jurisdiction to pass on the subject matter of the distribution of the dividends because of the decline in the value of the Reading Company stock then this court is faced with the situation that widely scattered noteholders of the $50,000,000 note issue were deprived of their property by a Federal Court without due process of law. *Such a question is always of public or general interest.* The questions as to whether 59b is applicable to bankruptcy as discussed in the petition (pp. 15-16) and in respondents' brief (p. 12) and whether an appeal may be taken from a three-judge court to a Circuit Court of Appeals as discussed in the petition (pp. 17-20) and in respondents' brief (pp. 20-22), as well as the question whether a *permissive* certiorari operates as an *exclusive remedy* as contended by the respondents (p. 21) and as denied by the petitioner (pp. 20-21) *are questions of general interest* regardless of whether or not Chapter XV is in force.

2. The decisions sought to be reviewed are in conflict with decisions of other circuits and with the decisions of the court.

Respondents were unable to justify the application of Rule 59b to the instant case which is in direct conflict with the decisions of this court and of the various circuits, as shown in petitioner's brief (pp. 14-16). Their only justification is (p. 12) that the denial of the motion because of Rule 59b was "only incidentally" involved. They also say that the order "is not a decision or even a dictum." A reference to the order which they quote in their brief contains the following:

> "It is thereupon now ordered * * * that said motion and petition filed August 31, 1940, be and the same is hereby overruled and denied because not timely filed (Federal Rules of Civil Procedure, Rule 59b)."

This part of the order refutes the contention that it was not "a decision" nor "even a dictum." The contention that this is only applicable to Chapter XV and not to the Bankruptcy Act is based on the misconception that Chapter XV is not part of the Bankruptcy Act. No authorities are necessary to show that Chapter XV is a part of the Bankruptcy Act, and if Rule 59b is applicable to Chapter XV then it is applicable to the entire Bankruptcy Act.

Respondents say (p. 13) that the decision of the Fourth Circuit dismissing the appeal on the ground that the exclusive jurisdiction was vested in this court is not in conflict with the decisions of this court or with decisions of other circuits. The Fourth Circuit held (R. 2) that no appeal under *any* circumstances can be taken to a Circuit Court of Appeals *on the ground that a three-judge court constituted a Circuit Court of Appeals.* This is *squarely in conflict* with the decision of the Seventh Circuit in the *Illinois Bell Telephone Company* cases (98 F. (2) 930, and 102 F. (2) 58). They seek to distinguish the decision of the Seventh Circuit on the ground that the appeal there involved "subsequent orders" entered by a three-judge court where the contention was that the orders were entered without jurisdiction or without power. This very question is involved in this case.

3. The decision of the Special Court that it had jurisdiction to determine the disposition of the dividends cannot be sustained under any theory.

It is urged (p. 15) that petitioner "is in error in its statement (Brief 13) that it was not necessary to construe the terms of the decree." On page 5 of their brief they quoted the pertinent part from Section 7.07 of the decree which is as follows:

"is hereby authorized and directed * * * to pay over to the B. & O. *all dividends* and interest which shall have been received by said Trustees from August 1, 1939, to the time of such payment to the B. & O. on the securities held by said Trustee under said Indenture *which would have been payable to the B. & O. under the provisions of said Indenture had there been no default by the B. & O. under said Indenture when said dividends or interest were so received* * * *." (Italics theirs.)

We also refer this court to Section 7.05 of the Decree which is part of the record in Case 625 to which they referred (p. 3), and we quote the following:

"SECURED NOTES

SECTION 7.05. The form and terms of a proposed Supplemental Indenture dated January 1, 1940, between the B. & O. and said Trustee under said Indenture securing the Secured Notes, which proposed Supplemental Indenture has been filed in the record of this proceeding as Exhibit No. 74, and the respective forms and terms of the Extension Agreements, Notations and New Coupons therein set out are hereby approved. Said Supplemental Indenture, Extension Agreements, Notations and New Coupons are consistent with the Plan and this Decree and necessary or desirable for the due and proper effectuation of the Plan and this Decree."

By the annexed motion showing a diminution of the record *we have supplied the material portion of the Supplemental Indenture which that decree approved.* That Supplemental Trust Indenture approved under the decree referred to in Section 3 to the change *in so far as it related to the defaults in interest or principal.* (Compare this Section 3 with Section 2 of Article Five of the original Trust Indenture in the "appendix" to Respondents' brief.) Section 4 of the Supplemental Trust Indenture stated: *"Except as expressly provided in this Sup-*

plemental Indenture the rights and powers of the Trustee with respect to the pledged securities, and the covenants, conditions and agreements relating thereto on the part of the company *shall be as provided in the note indenture,* with the same force and effect as if herein set forth in full."

It is apparent from the foregoing that *neither under the decree nor under the Supplemental Indenture* which the decree approved was there anything pertaining to the disbursement of dividends because of the decrease in the value of the Reading collateral. The decree authorized the payment of the dividends the same as if *"no default by the B. & O. was made,"* but the condition in the original Trust Indenture and in the Supplemental Trust Deed not to distribute dividends when the collateral was less than $225,000,000 *did not depend on a default of the B. & O.* The Trustee was prohibited from distributing dividends if the collateral was less than $225,000,000, independent of any default. It is apparent that the assumption of jurisdiction because it was necessary to construe the terms of the decree cannot be sustained.

They dispose of the point that the Special Court was without jurisdiction of the collateral in the possession of the Mortgage Trustee, by citations under Section 77 of the Bankruptcy Act. These decisions have no application to Chapter XV where the jurisdiction was *limited.* Section 77, like Section 77B, deals with *general reorganizations* and, of course, pledged securities in which the Debtor has an interest may be subject to the powers of the court administering such reorganization, but Chapter XV is not a reorganization statute. It is confined to *temporary relief* and deals only with *subject matters which are included in a Plan.* The Plan did *not include distribution of dividends on the collateral in the event the value of the collateral was less than $225,000,-*

000. It follows that it had no jurisdiction of this subject matter. The limited scope of the jurisdiction as distinguished from jurisdiction under reorganizations was *recognized by the Special Court in its opinion* (34 F. Supp. 154, 160).

In answer to the point in petitioner's brief (p. 10) that the Special Court had no jurisdiction of the subject matter of the Trustee's petition because the construction of the Trust Indenture was never submitted to the Interstate Commerce Commission nor to the noteholders and no approval or assent was ever obtained from them, they say (p. 17) that this was only "a question of law as to the meaning of the provision of the Indenture" and that it did not depend on questions of facts upon which either the Commission or the noteholders were to act. A reference to the decision of the Special Court (34 F. Supp. 154, 162) will refute this contention. *It shows that there were factual matters upon which the court passed.* Respondents say that petitioner's argument that the jurisdiction to construe the terms of the Trust Indenture belongs exclusively to the Equity Courts, overlooked the fact that Chapter XV conferred jurisdiction of the Equity Court on the Special Court. They overlooked that *this jurisdiction was limited to the scope of the Plan, as pointed out in the opinion of the Special Court* (34 F. Supp. 154, 160).

4. Petitioner has certified the record as made up by the respondents, and the record is sufficient to present the jurisdictional question.

Respondents complain that petitioner failed to certify a record sufficient to enable this court to pass "on the construction by the Special Court of its decree." The merits of the construction are not at issue, and the only issue is the *power to construe.* The petition (p. 2) re-

ferred to the opinion of the Special Court (34 F. Supp. 154) which *contains the entire subject matter necessary for review.* Counsel have also availed themselves of the record in Case No. 625 on the former application for certiorari. If there was anything additional they desired they could have moved the court and suggested a diminution of the record. Besides, *it is they who made the record.* They filed a motion in the Fourth Circuit and docketed the case (R. 3) and made up the record upon which the Fourth Circuit passed on the jurisdictional question. *If that record was good for them to raise a jurisdictional question it is equally sufficient for the jurisdictional question on our petition.*

5. The decision of the Fourth Circuit that this court was vested with the exclusive jurisdiction under Chapter XV affects federal appellate procedure generally.

Not a single case is cited by counsel on the point that where a *permissive* discretionary writ of certiorari is allowed that this remedy is *exclusive* and constitutes a denial of the right to appeal. Each case upon which they rely refers to the *right of appeal* but not to a *permissive certiorari.* The decision of the Fourth Circuit cannot be reconciled with the decision of the Seventh Circuit notwithstanding the great labor of the respondents to find distinctions. The question whether or not a decision from a three-judge court may be reviewed by a Circuit Court of Appeals and whether a permissive review by certiorari excludes a right of appeal is of such great and general importance to the entire system of judicial review as to warrant the issuance of the writ.

For the foregoing reasons we urge that the Writ be awarded.

Respectfully submitted,

MEYER ABRAMS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

Nos. 598 and 599

HARVARD STATE BANK,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

MOTION SUGGESTING DIMINUTION OF RECORD.

Now comes HARVARD STATE BANK, petitioner, and suggests a diminution of the record in that certain parts of Exhibit 74 described in the decree approving the Debtor's Plan are necessary for the consideration of this case.

MEYER ABRAMS,
Attorney for Petitioner.

EXCERPT FROM EXHIBIT 74 REFERRED TO IN ABOVE MOTION.

Exhibit 74, consisting of a Supplemental Indenture dated January 1, 1940, described in the Decree approving the Debtor's Plan, contains the following pertaining to the pledged securities with the Manhattan Company under the $50,000,000 mortgage:

"SECTION 3. The first sentence of the seventh paragraph of Section 2 of Article Five of the Note

Indenture is hereby amended so as to read as follows:

'All cash at any time received by the Trustee which under the provisions of this Section 2 is to be held by the Trustee as part of the security for the Notes shall from time to time, so long as the Company shall not be in default in the payment of interest on some one or more of the Notes, when and as the same shall become and be payable as therein or herein expressed, and none of the events of default, specified in subdivisions (b), (c), (d), (e) and (f) of Section 3 of Article Seven hereof shall have happened and be continuing, be applied by the Trustee, if the Company shall in writing so request, either to the purchase of such obligations issued or guaranteed by the Government of the United States of America (hereinafter termed Government Bonds), maturing by their terms on or before August 1, 1944, as may be specified in such request, or to the purchase of Notes in the market, or at public or private sale, at a price or prices, not exceeding the principal amount thereof and accrued interest, deemed by the Trustee in its discretion to be the best price or prices obtainable at the time.'

"Section 4. Except as expressly provided in this Supplemental Indenture the rights and powers of the Trustee with respect to the Pledged Securities, and the covenants, conditions and agreements relating thereto on the part of the Company, shall be as provided in the Note Indenture, with the same force and effect as if herein set forth in full. The lien securing the Notes and the interest thereon shall be unaffected by the extension thereof with interest at the rate of 4% per annum pursuant to this Supplemental Indenture."

AFFIDAVIT IN SUPPORT OF SUGGESTION.

STATE OF ILLINOIS }
COUNTY OF COOK } ss:

Meyer Abrams, being first duly sworn on oath, deposes and states that he is counsel for the petitioner in the above entitled cause.

Affiant further says that the foregoing Excerpt from Exhibit 74 is a true and correct copy of the part of that Exhibit described in the Decree approving the Debtor's Plan.

Affiant further says that he makes this affidavit pursuant to Rule 17 of this Court.

MEYER ABRAMS.

Subscribed and sworn to before me
this 30th day of December, A. D.
1940.

GRACE WIENER,
Notary Public.

DEC 27 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 598 AND 599

HARVARD STATE BANK,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE SPECIAL COURT, DISTRICT OF MARYLAND, AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

HENRY W. ANDERSON, Electric Building, Richmond, Va.
LEONARD D. ADKINS, 15 Broad Street, New York, N. Y.
GEORGE D. GIBSON, Electric Building, Richmond, Va.
Counsel for Respondents.

Dated December 21, 1940.

INDEX

PAGE

OPINIONS OF COURTS BELOW..... 1

JURISDICTION

(a) Jurisdiction to review Order No. 23 of the Special Court 2

(b) Jurisdiction to review order of Fourth Circuit. 2

STATEMENT OF THE CASE..... 2

QUESTIONS PRESENTED 9

SUMMARY OF ARGUMENT..... 9

ARGUMENT

1. THE PETITION RAISES NO QUESTION OF PUBLIC OR GENERAL INTEREST..... 10
2. THE DECISIONS OF THE SPECIAL COURT AND THE CIRCUIT COURT OF APPEALS NOW SOUGHT TO BE REVIEWED ARE NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OF OTHER CIRCUIT COURTS OF APPEAL..... 12
3. THE SPECIAL COURT CORRECTLY DECIDED THAT IT HAD JURISDICTION UNDER CHAPTER XV TO DETERMINE THE DISPOSITION OF THE DIVIDENDS HELD BY THE TRUSTEE..... 15
4. THE PETITIONER HAS FAILED TO CERTIFY A RECORD SUFFICIENT TO ENABLE THIS COURT TO PASS ON THE CONSTRUCTION BY THE SPECIAL COURT OF ITS DECREE..... 18
5. THE CIRCUIT COURT OF APPEALS CORRECTLY DECIDED THAT CHAPTER XV VESTED IN THIS COURT EXCLUSIVE APPELLATE JURISDICTION OVER PROCEEDINGS UNDER SAID CHAPTER..... 20

CONCLUSION 23

TABLE OF CASES CITED

PAGE

Bronson v. *Schulten*, 104 U. S. 410 (1881) 15
Brucker v. *Fisher*, 49 F. (2d) 759 (C. C. A. 6th, 1931) 21

Cheang-Kee v. *United States*, 70 U. S. 320 (1865) ... 15
Continental Illinois National Bank & Trust Co. v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935) 16, 18

Illinois Bell Telephone Co. v. *Slattery*, 98 F. (2d) 930 and 102 F. (2d) 58.....13, 21, 22

Jackson v. *Cravens*, 238 Fed. 117 (C. C. A. 5th, 1916) 21

S. S. Kresge Co. v. *Winget Kickernick Co.*, 102 F. (2d) 740 (C. C. A. 8th, 1939)..... 15

National Biscuit Co. v. *Kellogg Co.*, 96 F. (2d) 873 (C. C. A. 3d, 1938)..... 15

Oklahoma Gas & Electric Co. v. *Oklahoma Packing Company*, 292 U. S. 386 (1933).....13, 21

Stepp v. *McAdams*, 97 F. (2d) 874 (C. C. A. 9th, 1938) 15

United States v. *E. I. DuPont de Nemours & Co.*, 273 Fed. 869 (D. C., Del., 1921)..... 15

Wilentz v. *Sovereign Camp*, 306 U. S. 573 (1939)..13, 21

TABLE OF STATUTES CITED

PAGE

BANKRUPTCY ACT

Section 77 (U. S. C., Tit. 11, § 205) 16, 17
Chapter XV (U. S. C., Tit. 11, §§ 1200-1255, 2, 3, 4, 9, 10, 11, 13, 15, 17, 18, 20, 22
Section 710 (U. S. C., Tit. 11, § 1210) 3, 11
Section 713 (U. S. C., Tit. 11, § 1213) 3, 18
Section 715 (U. S. C., Tit. 11, § 1215) 3, 15, 16, 17
Section 745 (U. S. C., Tit. 11, § 1245) 2, 9, 20, 21
Section 755 (U. S. C., Tit. 11, § 1255) 11

JUDICIAL CODE

Sections 47 and 47(a) of Tit. 28, U. S. C. 22
Section 240(a) (U. S. C., Tit. 28, § 347) 2
Section 266 (U. S. C., Tit. 28, § 380) .. 4, 13, 14, 21, 22
Section 380(a) of Tit. 28, U. S. C. 22

EXPEDITING ACT

Sections 28 and 29 of Tit. 15, U. S. C. 22
Sections 44 and 45 of Tit. 49, U. S. C. 22

Supreme Court of the United States

OCTOBER TERM, 1940

HARVARD STATE BANK, *Petitioner,* *vs.* THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*, *Respondents.*	Nos. 598 and 599

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE SPECIAL COURT, DISTRICT OF MARYLAND, AND TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS OF COURTS BELOW

An opinion of the Special Court of three judges in the District Court of the United States for the District of Maryland, confirming the plan of adjustment of The Baltimore and Ohio Railroad Company (hereinafter called the B. & O.) is reported in 29 F. Supp. 608. A Decree in accordance with said opinion (hereinafter called the Decree) was entered on November 8, 1939, and a petition for a writ of certiorari for a review of the Decree was denied on January 29, 1940 (309 U. S. 654) and an application for a rehearing of the petition was denied on March 25, 1940 (309 U. S. 697).

An opinion of the Special Court construing the Decree is reported in 34 F. Supp. 154. Order No. 22 (R. 2-3) was entered by the Special Court in accordance with said opinion on August 3, 1940. The opinion of the Circuit Court of Appeals for the Fourth Circuit dismissing an appeal from the denial (Order No. 23, R. 12-13) of the Petitioner's motion to vacate Order No. 22 was rendered on November 12, 1940, and is contained in the Record at pages 17-24.

JURISDICTION

(a) Jurisdiction to review Order No. 23 of the Special Court.

The date of Order No. 23 sought to be reviewed herein is September 28, 1940 (R. 12).

The proceeding in the Special Court was under Chapter XV of the Bankruptcy Act (53 Stat. 1134, 11 U. S. C. §§ 1200-1255). The jurisdiction of this Court is invoked under Section 745 of Chapter XV.

(b) Jurisdiction to review order of Fourth Circuit.

The jurisdiction to review the order of the Circuit Court of Appeals for the Fourth Circuit is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. § 347).

STATEMENT OF THE CASE

There are so many inaccuracies and omissions in the Petitioner's statement of the case (Petition, 2-3; Brief, 7-9) that a complete restatement of the facts is necessary.

In 1938 a plan of adjustment for the B. & O. (Ex. No. 7, R. folio 16 in Docket No. 625 of this Court, October Term, 1939, herein called the Plan) was formally submitted to all affected security holders for their acceptance or rejection. The Plan contemplated, among other things, an extension of the maturity of the Secured Notes of the B. & O. (hereinafter called the Notes) from August 1, 1939, to August 1, 1944, at a reduced rate of interest and provided that the "collateral securing the Notes will remain unchanged". It further provided that upon consummation a supplemental indenture would be executed in respect of the Notes giving effect to the changes contemplated by the Plan and that such supplemental indenture should provide that the extended Notes would continue to be secured by the same lien as at present.*

On July 28, 1939, Chapter XV was added to the Bankruptcy Act. It provided a new system for financial readjustment in a limited class of cases without reorganization in the usual manner; *i.e.*, a system for (a) judicial investigation of voluntary plans of financial readjustment proposed by interstate railroads, authorized by the Interstate Commerce Commission and accepted by specified percentages of each class of affected creditors and (b) if such a plan were found to be fair and conformable to the financial standards prescribed in Chapter XV, judicial action to make such plan binding on non-assenting minorities.

Nisi prius jurisdiction under Chapter XV was confided (Sections 710, 713 and 715) to a special court of three

---

*The statement on page 11 of Petitioner's Brief that: "There was nothing in the Plan pertaining to this question," *i.e.*, the question involving the merits of the issue being presented to this Court, is inaccurate.

judges convened in the manner provided in Section 266 of the Judicial Code in the District Court having territorial jurisdiction over the principal office of the petitioning railroad. The B. & O. filed its petition under Chapter XV in the District Court of the United States for the District of Maryland, asking that a special court be convened and that the Plan be considered and confirmed. The Special Court was thereupon duly constituted pursuant to Section 266. It consisted of the Hon. John J. Parker, Senior Circuit Judge of the Fourth Circuit, the Hon. A. M. Dobie, then United States District Judge for the Western District of Virginia and now Circuit Judge of the Fourth Circuit, and the Hon. W. Calvin Chesnut, United States District Judge for the District of Maryland.

Various persons intervened in the proceedings, including the Trustee under the Indenture securing the Notes (hereinafter called the Trustee), the Reconstruction Finance Corporation, owner of $13,500,000 of Notes (34 F. Supp. 154, 163) and other owners of Notes. After notice, a public hearing was held on September 18-20, 1939, and an opinion approving the Plan was filed on October 9, 1939 (29 F. Supp. 608). The Decree (R. folio 200 in Docket No. 625 of this Court, October Term, 1939) was entered on November 8, 1939, approving and confirming the Plan and directing its effectuation in conformance therewith. Messrs. Abrams and Moss (now counsel for the Petitioner herein) who had appeared on behalf of other clients, not owners of Notes, petitioned this Court for a writ of certiorari for a review of the Decree (Docket No. 625, October Term, 1939). The petition was denied on January 29, 1940 (309 U. S. 654) and an application for a rehearing of the petition was denied on March 25, 1940 (309 U. S. 697).

Section 7.07 of the Decree,* which Section is set out in full in the Appendix hereto, provided in part that the Trustee

> "is hereby authorized and directed * * * to pay over to the B. & O. *all dividends* and interest which shall have been received by said Trustee from August 1, 1939, to the time of such payment to the B. & O. on the securities held by said Trustee under said Indenture *which would have been payable to the B. & O. under the provisions of said Indenture had there been no default by the B. & O. under said Indenture when said dividends* or interest *were so received* * * *."

Section 2 of Article Five of the Supplemental Indenture executed in consummation of the Plan with respect to the Notes contains a similar provision with respect to dividends and interest on the securities pledged under the Indenture securing the Notes (hereinafter called the Indenture).

Among the securities held by the Trustee under the Indenture are certain shares of stock of Reading Company and from time to time after August 1, 1939 (when default was made in the payment of the principal of the Notes), the Trustee had received dividends aggregating $1,694,000 on such stock. On May 16, 1940, the Trustee filed a petition with the Special Court requesting directions and instructions with regard to the disposition to be made, pursuant to the Decree, of dividends then held by the Trustee. The Trustee was in doubt as to whether such dividends, in the

---

*The statement at page 11 of Petitioner's Brief that "there was nothing in the decree which affirmed the plan relating to this subject matter" is inaccurate.

language of Section 7.07 of the Decree, "would have been payable to the B. & O. under the provisions of said Indenture had there been no default by the B. & O. under said Indenture when said dividends * * * were so received," because Section 2 of Article Five of the Indenture provided that the Trustee should hold as additional security under the Indenture any "dividends paid out of surplus or earnings of Reading Company when the amount of the combined capital and surplus of Reading Company, *as shown by its books* is, or by reason of such payment would become, less than $225,000,000." 34 F. Supp. 154, 161.* The

---

*Although the merits of the case are not before this Court, the Respondents are compelled to call the attention of the Court to the failure of the Petitioner to make any reference to the "as shown by its books" qualification in discussing the capital and surplus provision in the statements of the case on page 2 of the Petition and on page 7 of the Brief. It was this qualification that enabled the Special Court to say (34 F. Supp. 154, 162):

> "On the merits of the question submitted we have no difficulty in reaching the conclusion that the Trustee should, under existing circumstances, continue to pay over these Reading Co., dividends to the B. and O. * * *
>
> "But the controlling consideration in our view is that the very definite provision in the deed of trust affecting this matter requires the Trustee to base its action with respect to the disposition of the Reading Company dividends on the amount of the capital and surplus of the Reading Company *as shown by its books.* * * *"

Only once does the Petitioner refer to the qualification and that is only incidentally and ambiguously in the first complete sentence on page 8 of the Brief. The insinuation that the Petitioner attempts to create by his emphasis of the disparity between the book value and market value of the Reading stock in the light of the absence of a single clear reference to the "as shown by its books" qualification permeates the

applicable part of Section 2 of Article Five of the Indenture is set out in full in the Appendix hereto. There was no question that the amount of the capital and surplus of the Reading Company, "as shown by its books," had been in excess of $225,000,000 at all times in question. The petition of the Trustee, however, raised the question whether the Decree (which, in effect, incorporated by reference the above provision of the Indenture) required it to pay over such dividends to the B. & O. in view of the fact that the assets of the Reading Company included a majority of the outstanding stock of The Central Railroad Company of New Jersey, carried on the books of the Reading Company at its approximate cost of about $160 per share. The Central Railroad Company of New Jersey had filed a petition under Section 77 of the Bankruptcy Act in October, 1939, and the market value of its stock, when the Special Court handed down its opinion, was about $5 per share. 34 F. Supp. 154, 160-161.

Notice of a hearing to be held before the Special Court on July 16, 1940, for the purpose, among others, of considering the petition of the Trustee, was duly given by mailing a copy of the order of the Special Court providing for said hearing and of said petition to all counsel in the proceedings (including Messrs. Abrams and Moss), by mailing a notice of such hearing to each known holder of Notes (which the Petitioner purports to be) and by publication of such notice once a week for two successive weeks in The New York Times and in The Baltimore Sun (R. 7). Said notice "was duly served upon" the Petitioner (R. 4).

Petition and Brief. Because of this omission, the Petition and the Brief fail to disclose that the question before the Special Court was whether the words "as shown by its books" were to be given their normal meaning and effect.

After the hearing, the Special Court decided, as indicated by its opinion filed on August 3, 1940 (34 F. Supp. 154), (a) that it had jurisdiction to decide the question submitted by the Trustee and (b) that the dividends in question should be paid over to the B. & O. under Section 7.07 of the Decree. On August 3, 1940, the Special Court entered Order No. 22 (R. 2-3) directing such payment.

On August 31, 1940, the Petitioner filed a motion and petition with the Special Court requesting it to vacate its order on the grounds of (1) lack of jurisdiction and (2) that "no evidence, as far as the Petitioner knows, was presented to the Court upon which it could base its decision" (R. 4-5).* Although notice of the hearing on July 16, 1940, had been "duly served upon" the Petitioner (R. 4), the Petitioner was not present or represented at said hearing and made no objection at the time to the entry of the order, and its petition and motion did not show any reason for its failure to do so (R. 13).

On September 28, 1940, the Special Court by Order No. 23 (R. 12-13) overruled and denied said motion and petition. On October 10, 1940, the Petitioner appealed to the United States Circuit Court of Appeals for the Fourth Circuit from Orders Nos. 22 and 23 and from an earlier order not involved in the present Petition. On November 12, 1940, the Circuit Court granted a motion to docket and dismiss the appeal on the ground that exclusive jurisdiction to review the orders of the Special Court was vested in this Court by certiorari. The opinion is contained in the Record at pages 17-24.

---

*Objection (2) was in addition to the jurisdictional objection which is the only one that the Petitioner refers to in his Statement of the Matter Involved on pages 2-3 of the Petition.

QUESTIONS PRESENTED

The only question of substance on which this Court is asked to pass is whether the Special Court correctly construed its Decree in connection with the disposition of the Reading dividends held by the Trustee. The Transcript of Record filed by the Petitioner does not contain the material necessary to enable this Court to pass on that question.

Accordingly, the Petition presents only the following incidental questions:

(1) Did Chapter XV of the Bankruptcy Act vest jurisdiction in the Special Court to interpret its Decree and to instruct the Trustee in the premises?

(2) Does Section 745 of Chapter XV of the Bankruptcy Act vest appellate jurisdiction over proceedings under said Chapter exclusively in this Court?

SUMMARY OF ARGUMENT

1. The Petition raises no question of public or general interest.

(a) The ultimate question at issue in these proceedings is the proper construction of a specific provision of a particular Trust Indenture, obviously involving no question of general interest.

(b) The questions of Federal procedure by which the Petitioner attempts to establish a case for certiorari are all questions involving the interpretation of the provisions of Chapter XV of the Bankruptcy Act. The interpretation of the provisions of

Chapter XV presents no question of public or general interest, since no new proceedings can be instituted under Chapter XV, and all but one of the proceedings instituted thereunder have terminated.

2. The decisions of the Special Court and the Circuit Court of Appeals now sought to be reviewed are not in conflict with decisions of this Court or of other Circuit Courts of Appeal.

3. The Special Court correctly decided that it had jurisdiction under Chapter XV to determine the disposition of the dividends held by the Trustee.

4. The Petitioner has failed to certify a record sufficient to enable this Court to pass on the construction by the Special Court of its Decree.

5. The Circuit Court of Appeals correctly decided that Chapter XV vested in this Court exclusive appellate jurisdiction over proceedings under said Chapter.

ARGUMENT

1. THE PETITION RAISES NO QUESTION OF PUBLIC OR GENERAL INTEREST.

The ultimate question in issue in this case is the construction of a specific provision of a particular Indenture which was incorporated by reference in the Decree of the Special Court, and the sole question involved in such construction is whether the words "as shown by its books" in the Indenture are to be given their ordinary and usual meaning or are to be qualified. Certainly this Court will

not concern itself with questions of this type, involving only the construction of a particular instrument and having no general application whatsoever.

Counsel for the Petitioner, realizing that that question could not concern this Court, has attempted to bolster up his case by arguing that the decisions of the Special Court and the Circuit Court of Appeals which he asks this Court to review involved important questions of Federal procedure. It is clear, however, that, even if these procedural questions were of importance in themselves, they cannot be of any public or general interest because they all arise under Chapter XV of the Bankruptcy Act. Chapter XV of the Bankruptcy Act is no longer an effective statute and the construction of its provisions is no longer of any public or general interest.

Section 755 of Chapter XV provides that "the jurisdiction conferred upon any court by this chapter shall not be exercised by such court after July 31, 1940, except in respect of any proceedings initiated by filing a petition under section 710 hereof on or before July 31, 1940." Only six petitions under Chapter XV were filed on or before July 31, 1940. Final decrees confirming plans of adjustment have been entered in all these proceedings, and the statutory periods for applying for a writ of certiorari from such decrees have expired. Counsel for Respondents are advised by counsel in said proceedings that all but one of said proceedings are considered terminated. In the one remaining proceeding (that involving the Peoria and Eastern Railway Company), a petition for certiorari to review the decree was denied by this Court in November, 1940. Accordingly, the interpretation of the provisions of Chapter XV cannot now be of any public or general interest.

2. THE DECISIONS OF THE SPECIAL COURT AND THE CIRCUIT COURT OF APPEALS NOW SOUGHT TO BE REVIEWED ARE NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OF OTHER CIRCUIT COURTS OF APPEAL.

Petitioner argues that the denial of Petitioner's motion to vacate Order No. 22 was dependent upon an application of Rule 59(b) of the Federal Rules of Civil Procedure, and that, accordingly, such denial was inconsistent with certain decisions to the effect that Rule 59(b) is not applicable in bankruptcy cases. It is true that the Special Court referred to Rule 59(b) in Order No. 23 denying the motion to vacate but it referred to that Rule only incidentally. The complete decretal portion of Order No. 23 (R. 12-13) is as follows:

> "It is thereupon now Ordered this 28th day of September, 1940 that said motion and petition filed August 31, 1940, be and the same is hereby overruled and denied because not timely filed (Federal Rules of Civil Procedure, Rule 59b), and because an examination of the petition and brief filed in support thereof shows that no substantial matter is therein presented, which has not heretofore been fully considered by the court."

The motion and petition were denied (1) on the merits and (2) because not timely filed and it is only with reference to the latter ground that the Special Court incidentally referred to Rule 59(b) and then only, so far as appears from the wording of Order No. 23, by way of analogy. It is clear that Order No. 23 is not a decision, or even a dictum, that Rule 59(b) is applicable in bankruptcy cases. Even if

the reference to Rule 59(b) should be considered one of the bases for the decision, it is at most an expression of opinion that Rule 59(b) is applicable in cases under Chapter XV. As pointed out above, such a decision could be of no public or general interest.

Petitioner also claims that the decision of the Circuit Court of Appeals dismissing the appeal to that Court on the ground that exclusive appellate jurisdiction is vested in this Court under Chapter XV is in conflict with the decisions of this Court in *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Company,* 292 U. S. 386 (1933) and *Wilentz* v. *Sovereign Camp,* 306 U. S. 573 (1939) and with the decisions of the Circuit Court of Appeals for the Seventh Circuit in *Illinois Bell Telephone Co.* v. *Slattery,* 98 F. (2d) 930 and 102 F. (2d) 58.

There is no basis for this claim. In the *Oklahoma Natural Gas* case and the *Wilentz* case the alleged appellate jurisdiction of this Court was based on Section 266 of the Judicial Code, providing for a direct appeal to this Court from a final decree granting or denying a permanent injunction in a suit to restrain a state officer from enforcing or executing a state statute or an order of a state commission, on the ground of the unconstitutionality of such statute or order. This Court decided that the suits in question did not comply with the provisions of Section 266 because there was no basis for relief of any sort against the state officers, joined as defendants, and that accordingly the provision of Section 266, authorizing a direct appeal to this Court, was inapplicable.

The *Illinois Bell Telephone* cases, decided by the Circuit Court of Appeals for the Seventh Circuit, also arose in proceedings originally instituted before a three-judge court

pursuant to Section 266. In those cases, however, the original suit seeking to enjoin action by the state officers had been finally determined, after appeal to this Court, and the orders under consideration involved only the disposition of certain moneys collected by the Telephone Company on rates which had been found to be excessive. The Circuit Court of Appeals properly held that the exclusive appellate jurisdiction vested in this Court by Section 266 was limited by the terms of Section 266 to suits seeking to enjoin state officers, and that the provisions of Section 266 as to appellate jurisdiction were not applicable to subsequent orders of the three-judge court not involving questions of injunction against state officers.

Petitioner seeks to argue that these cases were decided on the ground that the three-judge court did not have jurisdiction under Section 266 to enter the orders appealed from, and that for that reason appellate jurisdiction was not vested in this Court. But it is clear that the question decided by this Court and by the Circuit Court of Appeals for the Seventh Circuit in those cases was not whether the Special Court had jurisdiction, but whether the order from which the appeals were taken was the kind of an order over which, under the provisions of Section 266, this Court had exclusive appellate jurisdiction. These cases are further discussed under Point 5 below.

It is clear that there is nothing in the decisions sought to be reviewed which is in conflict with any decision of this Court or with any decision of any other Circuit Court of Appeals referred to by the Petitioner.

3. THE SPECIAL COURT CORRECTLY DECIDED THAT IT HAD JURISDICTION UNDER CHAPTER XV TO DETERMINE THE DISPOSITION OF THE DIVIDENDS HELD BY THE TRUSTEE.

The Petitioner is in error in his statement (Brief, 13) that it was not necessary to construe the terms of the Decree. As pointed out in the foregoing statement of facts, Section 7.07 of the Decree, directing the Trustee to pay over "dividends which would have been payable to the B. & O. under the provisions of said Indenture", incorporated by reference the restrictions in the Indenture. Without a construction of the Decree in this respect, the Trustee would have acted at peril. If it refused to pay, it might be in contempt for violating the Decree. If it paid, without a construction of the Decree and of the provisions of the Indenture incorporated therein by reference, it might be liable to Noteholders.

The Special Court had the inherent right, which is thoroughly established, of a court to construe its own decrees and orders.*

Furthermore, Section 715 of Chapter XV specifically provides that a three-judge court convened for proceedings under Chapter XV shall, during the pendency of those proceedings, "have exclusive jurisdiction of the petitioner and

---

*_Cheang-Kee_ v. _United States_, 70 U. S. 320 (1865); _Bronson_ v. _Schulten_, 104 U. S. 410 (1881); _S. S. Kresge Co._ v. _Winget Kickernick Co._, 102 F. (2d) 740 (C. C. A. 8th, 1939); _National Biscuit Co._ v. _Kellogg_ Co., 96 F. (2d) 873 (C. C. A. 3rd, 1938), reversed on other grounds 305 U. S. 111; _Stepp_ v. _McAdams_, 97 F. (2d) 874 (C. C. A. 9th, 1938); _United States_ v. _E. I. DuPont de Nemours & Co._, 273 Fed. 869 (D. C., Del., 1921).

of its property wherever located to the extent which may be necessary to protect the same against any action which might be inconsistent with said plan of adjustment or might interfere with the effective execution of said plan if approved by the court, or otherwise inconsistent with or contrary to the purposes and provisions of this chapter." The Plan provided that "the collateral securing the Notes will remain unchanged" and that the supplemental indenture to be executed upon consummation of the Plan "will, among other things, provide that the extended Bonds or Notes will continue to be secured by the same lien as at present." As stated by the Special Court in its opinion (34 F. Supp. 154, 160-1), the dividends in question aggregated $1,694,000, which was nearly 10% of the annual fixed interest of the B. & O. under the Plan and, accordingly, failure of the Trustee to pay over the Reading dividends to the B. & O. might interfere with the effective execution of the Plan, within the meaning of Section 715 of Chapter XV.

The provisions of Section 715 of Chapter XV, quoted above, are a complete answer to Petitioner's argument that the Special Court had no jurisdiction over the collateral in the possession of the Trustee. In *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935), this Court held that under Section 77 of the Bankruptcy Act the district court had jurisdiction over assets of the debtor pledged as collateral, whether located within or without the district. Section 77 provides that "the court in which such order approving the petition is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located." The language is similar to

that of Section 715 of Chapter XV and has been construed by this Court to confer jurisdiction over assets of the debtor pledged as collateral. There is no limitation on the jurisdiction so conferred by Section 715, except that jurisdiction is granted only to the extent which may be necessary to protect such assets against action which might be inconsistent with the plan or might interfere with the effective execution of the plan. As pointed out above, the Special Court correctly held that failure to pay over to the B. & O. the dividends in question might interfere with the effective execution of the Plan. The cases cited by the Petitioner were decided under sections of the Bankruptcy Act which do not confer on the Court jurisdiction similar to that conferred by Section 77 and Chapter XV, and are obviously not in point.

Petitioner's argument (Brief, 10) that the Special Court had no jurisdiction of the subject-matter presented by the Trustee's petition because the construction by the Special Court of the duties of the Trustee with respect to the Reading dividends was never submitted to the Interstate Commerce Commission or to the Noteholders for approval or assent is without merit. This was not a question of a change in the terms of securities, requiring approval by the Commission and the assent of a specified percentage of security holders. It was a question of law as to the meaning of a provision of the Indenture which became incorporated by reference in the Decree. It is the same as if the Special Court had been asked to construe an ambiguous provision in the Plan itself. The provision would have to be assented to by security holders as part of the Plan, but the meaning of the provision would be a question of law for determination by the Special Court.

Petitioner's argument that jurisdiction to construe the terms of a Trust Indenture belongs exclusively to equity courts, not to a statutory court, overlooks the fact that Section 713 of Chapter XV specifically gives the Special Court constituted under Chapter XV "all the powers of a district court sitting in equity." Moreover, as stated by this Court in *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co., supra,* at page 675, courts of bankruptcy "are essentially courts of equity, and their proceedings inherently proceedings in equity."

4. THE PETITIONER HAS FAILED TO CERTIFY A RECORD SUFFICIENT TO ENABLE THIS COURT TO PASS ON THE CONSTRUCTION BY THE SPECIAL COURT OF ITS DECREE.

There is nothing in the Transcript of Record filed by the Petitioner in this case which gives this Court the information necessary to enable it to determine whether or not the Special Court correctly construed its Decree in directing payment to the B. & O. of the Reading dividends held by the Trustee. The Transcript does not contain the Decree or even that portion of it dealing with the disposition of these dividends. It does not contain the Indenture or any part thereof. It does not contain the Stipulation of Facts filed with the Special Court in connection with the petition of the Trustee, nor any of the testimony taken at the hearing before the Special Court.

Because of the Petitioner's failure to include this essential material, his Petition is inadequate in so far as it asks certiorari in respect of Order No. 23 of the Special Court.

Respondents had no opportunity to cure or to attempt to cure the inadequacy in the Transcript of Record prior

to the time it was filed. On or about November 23, 1940, Messrs. Hunton, Williams, Anderson, Gay & Moore, of counsel for Respondents, received an unsigned "Notice", referring only to the decision of the Circuit Court in Case No. 4718 and reciting that a designation of record for certiorari was therewith enclosed. In fact, there was no such enclosure. Mr. George D. Gibson, of said firm, wrote to counsel for the Petitioner on November 23, 1940, stating that the designation of record was not enclosed. A reply of counsel for the Petitioner under date of November 26, 1940 was received, containing the following paragraph:

> "This is to acknowledge your letter of November 23rd wherein you state that the copy of the Designation of the Record was not found in the letter. There must certainly have been an oversight, but for your information I desire to state that the Designation merely called for the complete record in Case Number 4718. We have already forwarded the Petition for Certiorari to be filed with the Clerk of the United States Supreme Court and as soon as we get word that it was docketed we will mail you a copy of the record and petition as required by the rules of court."

Neither in the original "Notice" nor in the letter of November 26, 1940 was there any intimation that the Petitioner was asking for certiorari in respect of Order No. 23. Accordingly, Respondents had no opportunity to file any counter-designation to include in the Record the material essential to enable this Court to pass on the merits of the question decided by the Special Court by Orders Nos. 22 and 23.

In view of this incomplete Record, and the fact that Petitioner does not discuss, except by indirection, the correctness of the Special Court's decision on the merits, we think it inappropriate to discuss that question here. However, we repeat that the question thus omitted by the Petitioner from his Transcript of Record and from his Brief is the only question of substance involved in these proceedings.

5. THE CIRCUIT COURT OF APPEALS CORRECTLY DECIDED THAT CHAPTER XV VESTED IN THIS COURT EXCLUSIVE APPELLATE JURISDICTION OVER PROCEEDINGS UNDER SAID CHAPTER.

Section 745 of Chapter XV provides as follows:

> "Any final order or decree of the special court may be reviewed by the Supreme Court of the United States upon application for certiorari made by any person affected by the plan who deems himself aggrieved within sixty days after the entry of such order or decree, pursuant to the provisions of the Federal Judicial Code."

In form, of course, this language is permissive. But that was obviously the only proper form of expression because the purpose of Congress was only to confer jurisdiction upon this Court, the exercise of such jurisdiction in any particular case being dependent upon the concurrence of two further conditions, that is (1) proper application therefor and (2) election by this Court to proceed. Clearly, however, when permissive jurisdiction by certiorari directly from this Court is provided in a statute dealing in full with a specific and limited subject matter, as here, that provision is exclusive, and a review of the matters so provided for may not be had elsewhere.

Section 266 of the Judicial Code provides that a direct appeal to this Court "may be taken" from a final decree in proceedings to enjoin state officers from enforcing state statutes because of asserted unconstitutionality and it is held that the mode of review so provided is exclusive and no appeal lies to a circuit court of appeals. *Jackson* v. *Cravens,* 238 Fed. 117 (C. C. A. 5th, 1916) and *Brucker* v. *Fisher,* 49 F. (2d) 759 (C. C. A. 6th, 1931). Of course, a suit must be within the statute to make the direct review provision applicable. This Court has pointed out in *Wilentz* v. *Sovereign Camp,* 306 U. S. 573, 581 (1939), that if a suit is not one to restrain the action of state officers, "their presence in the suit generates no interest which it is the purpose of § 266 to protect and must be regarded as colorable only for the purpose of securing the advantages of proceeding before a court of three judges, as was the presence of the state officers in *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., supra* [292 U. S. 386], where it was held that there was no appeal under § 266." Since there was "no substantial basis for relief by injunction restraining the action of state officers" in the *Wilentz* or *Oklahoma Gas* cases, appeal to this Court did not lie.

Similarly, the orders appealed from in *Illinois Bell Telephone Co.* v. *Slattery,* 98 F. (2d) 930 and 102 F. (2d) 58 were not final decrees "granting or denying a permanent injunction in a suit to restrain a state officer" and hence were not orders reviewable directly by this Court under Section 266.

The language of Section 745 of Chapter XV differs materially from the language of Section 266. It provides that *any* final order or decree of the Special Court may be reviewed by this Court. It is therefore clear that the deci-

sions under Section 266 referred to by the Petitioner and discussed above are not in point on the question of appellate jurisdiction under Chapter XV.

It has been the consistent policy of Congress to rest appellate jurisdiction in this Court under statutes providing for three-judge courts,* and it has been universally recognized that the appellate jurisdiction of this Court under such statutes is and was intended to be exclusive. A contrary result under Chapter XV would be a reversal of a long-established policy. Obviously, the reason for such exclusive appellate jurisdiction is the public interest in expediting the disposition of the proceedings to which such jurisdiction applies, and that reason is particularly applicable to proceedings under Chapter XV, which was intended to provide a speedy method for readjustment of railroad finances.

Another reason why the appellate jurisdiction of this Court is exclusive in such cases was well stated by Mr. Abrams, counsel for the Petitioner herein, in a brief filed by him with this Court in *Berman* v. *Illinois Bell Telephone Co. et al.,* Docket No. 1010, October Term, 1937, being one of the appeals to this Court in the *Illinois Bell Telephone Company* cases referred to above. In that brief Mr. Abrams said at page 24:

> "In further argument supporting a direct appeal, it is worthy of note that one of the reasons for permitting such an appeal to the Supreme Court is that at least one Circuit Court judge of the specially

---

***See Section 380 of Title 28, U. S. C.; Section 380a of Title 28, U. S. C.; Sections 47 and 47a of Title 28, U. S. C.; Sections 28 and 29 of Title 15, U. S. C.; Sections 44 and 45 of Title 49, U. S. C.**

> organized three judge court has already passed upon the question involved. There would be little sense in giving an appellate review of a decision of such a court to the Circuit Court of Appeals. * * *"

In this case two of the three judges of the Special Court are Circuit Court Judges, one being the Senior Circuit Judge.

CONCLUSION

It is respectfully submitted that the Petition for writs of certiorari should be denied.

HENRY W. ANDERSON,
Electric Bldg.,
Richmond, Va.

LEONARD D. ADKINS,
15 Broad Street,
New York, N. Y.

GEORGE D. GIBSON,
Electric Bldg.,
Richmond, Va.
Counsel for Respondents.

APPENDIX

Section 7.07 of the Decree

SECTION 7.07. The B. & O. is hereby authorized and directed, as soon as practicable after the execution of the Supplemental Indenture referred to in Section 7.06 hereof, to cause to be attached to the Secured Notes Extension Agreements, and, if the Secured Notes are in coupon form, New Coupons and to cause to be stamped or imprinted on the Secured Notes Notations, all substantially in the respective forms set out in the Supplemental Indenture referred to in Section 7.05 hereof, in the manner more fully specified in said Supplemental Indenture. As soon as practicable after the execution of the Supplemental Indenture referred to in Section 7.06 hereof, said Trustee referred to in Section 7.05 hereof is hereby authorized and directed (1) to present all obligations held by it and affected by the Plan as herein designated for annexation of agreements and stamping or imprinting of notations as in this Article VII provided and (2) to pay over to the B. & O. all dividends and interest which shall have been received by said Trustee from August 1, 1939, to the time of such payment to the B. & O. on the securities held by said Trustee under said Indenture which would have been payable to the B. & O. under the provisions of said Indenture had there been no default by the B. & O. under said Indenture when said dividends or interest were so received for application by the B. & O. to the next succeeding interest payment on the Secured Notes, upon receiving from the B. & O. an undertaking substantially as provided in said Supplemental Indenture.

Excerpt from Section 2 of Article Five of Indenture Securing the Notes

SECTION 2. Unless the Company shall be in default in the payment of interest on some one or more of the Notes,

when and as the same shall become and be payable as therein and herein expressed, or unless some one or more of the events of default specified in subdivisions (*b*), (*c*), (*d*), (*e*) and (*f*) of Section 3 of Article Seven shall have happened and shall be continuing, the Trustee shall not be entitled to collect or to receive the interest and dividends (other than (1) dividends payable in stock, (2) dividends representing a distribution of capital and (3) dividends paid out of surplus or earnings of Reading Company when the amount of the combined capital and surplus of Reading Company, as shown by its books is, or by reason of such payment would become, less than $225,000,000.) payable on the Pledged Securities, and the Trustee shall, as they mature, cut off and cancel the coupons on any bonds in coupon form and, on the written demand of the Company, shall deliver such coupons so cancelled to or upon the written order of the Company, and shall, from time to time, deliver to the Company, at its request, such dividend orders, if any, as may be necessary to enable the Company to receive such dividends payable on the Pledged Securities. The Trustee shall be entitled to receive and shall hold as additional security hereunder any (1) dividends payable in stock or (2) dividends representing a distribution of capital or (3) dividends paid out of surplus or earnings of Reading Company when the amount of the combined capital and surplus of Reading Company as shown by its books is, or by reason of such payment would become, less than $225,000,000. Except as in this indenture provided, the Trustee shall be under no duty to keep account of interest or dividends on the Pledged Securities or to collect the same and shall not in any way be responsible therefor. Unless advised to the contrary in writing by bearers or registered holders of five per cent. in principal amount of the Notes at the time outstanding, the Trustee shall be entitled to assume that dividends paid in cash do not represent (1) a distribution of capital or (2) a distribution out of surplus or earnings of Reading Com-

pany made when the amount of the combined capital and surplus of Reading Company as shown by its books is, or by reason of such payment would become, less than $225,000,000.

The Company covenants and agrees that in case it shall at any time receive any stock as a dividend on any stock at the time pledged hereunder, or in the exercise of subscription rights accruing to the Company as the owner of any such pledged stock, or any dividends (whether stock or not) representing a distribution of capital or paid out of surplus or earnings of Reading Company when the amount of the combined capital and surplus of Reading Company as shown on its books is, or by reason of such payment would become, less than $225,000,000, the same will be forthwith delivered or paid to the Trustee to be held as additional security hereunder.